2025:PHHC:065311

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH

131

CRM-M-26267-2025 (O&M)
Date of decision: 15.05.2025

M/s Oswal Denims ...Petitioner

Versus

M/s Avion Fabrics and another ...Respondents

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Present:- Mr. Aalok Jagga, Advocate
for the petitioner.

MANISHA BATRA, J. *(Oral)*

1. This petition has been filed by the petitioner under Section 528 of Bharatiya Nagarik Suraksha Sanhita, 2023 *(for short 'BNSS')* for quashing of the order dated 24.04.2025 (Annexure P-14), passed by the Court of learned Judicial Magistrate First Class, Ludhiana in Complaint bearing No. COMA/3520/2019, titled as ***Oswal Denims vs. Avion Fabrics***, filed by the petitioner under Section 138 of the Negotiable Instruments Act, 1881 *(for short 'the Act')*, whereby an application filed by him under Section 348 of BNSS *(which is pari materia with Section 311 of Cr.P.C.)* has been dismissed.

2. Briefly stated, the aforementioned complaint has been filed by the petitioner against the respondents under Section 138 of the Act on the allegations that respondent No. 2, being proprietor of respondent No. 1/firm, had issued a cheque in favour of the petitioner to discharge the legally enforceable liability of respondent No. 1/firm. The said cheque had been dishonoured and despite issuance of notice, no payment had been made, thereby compelling him to file the aforementioned complaint. During the

pendency of the complaint, the petitioner moved an application under Section 348 of BNSS seeking recall of respondent No. 2/accused, who had appeared as DW-1 while producing evidence in defence. The said application has been dismissed by the learned trial Court by passing the impugned order, operative part of which, reads as under :

> "It is a settled law that power under Section 311 Cr.P.C. is discretionary in nature and must be exercised with caution and in exceptional circumstances. In the present case, question with regard to invoices, GST returns, balance sheets and payment made by the accused were very much well within the knowledge of the complainant and he ought to have asked the same when DW1 appeared in the witness box. Despite giving sufficient opportunities to cross-examine DW1, it can not be said that said questions were left to be put to the accused(DW1) due to oversight. Moreover, Hon'ble Supreme Court of India has held in plethora of cases that application under Section 311 Cr.P.C. can not be allowed merely in order to fill up lacuna or gaps in parties case once the final arguments have been advanced by defence counsel. So, it seems that the present application has been filed at fag end the of the trial.
>
> 7. Moreover, Hon'ble Supreme Court of India in case titled as ***Neha Begum Versus State of Assam, Petition(s) for Special Leave to Appeal (Crl.) No(s).3910/2024, Date of Decision:02.09.2024***, has held that " Court can summon, recall or re-examine a witness only if it is satisfied that the prayer is not made to fill lacuna and non-summoning would cause serious prejudice to the accused. The Court rejected vague or unsubstantiated grounds for recall and emphasized that Section 311 Cr.P.C. should not be used as

a tool for dilatory tactics or to fill gaps in earlier cross-examination."

Furthermore, Hon'ble Supreme Court of India in case titled as ***Satbir Singh Versus State of Haryana, Criminal Appeal No. of 2013 (@ SLP (CRL.) No.2400 of 2011, Date of Decision 04.07.2013***, has held that Section 311 Cr.P.C. should not be used to fill lacuna in prosecution case and must be exercised to prevent failure of justice, ensuring the trial is not rendered inconclusive or speculative.

So, in view of the citations of Hon'ble Supreme Court of India as well as facts and circumstances as mentioned above, present application has been moved by the learned counsel for the applicant at fag end of the trial when the final arguments have already been advanced by the opposite party. Moreover, re-cross-examination of witness would be grave prejudice to the accused. Thus, it seems that present application has been moved in order to fill up lacuna.

8. Accordingly, in view of aforementioned reasons application moved by applicant/complainant stands dismissed. Findings herein are for the sole purpose of disposing off the present application and shall not affect the merits of the case."

3. It is argued by learned counsel for the petitioner that the impugned order is not sustainable in the eyes of law as while passing the same, the learned Magistrate ignored the well settled proposition of law to the effect that it had power to recall and re-examine the witness at any stage of the case. The recall of DW-1 was very much essential for just decision of the case as while cross-examining him previously, certain material questions could not

be put to him. Due to non-examination of DW-1 on those very points, a serious prejudice is being caused to the petitioner. It is further argued that non-examination of DW-1 on those points cannot be taken into consideration as a lacuna which is sought to be filled up by the petitioner. With these broad submissions, it is urged that the petition deserves to be allowed. To fortify his arguments, learned counsel for the petitioner has relied upon the authority cited as ***Rajendra Prasad vs. the Narcotics Cell through its Officer-in charge, 1993 RCR (Criminal) 440***.

4. I have heard learned counsel for the petitioner at considerable length and have also gone through the material placed on record carefully.

5. It is well settled proposition of law that an application under section 348 of BNSS *(which is pari materia with Section 482 of Cr.P.C.)* must not be allowed only to fill up lacunas in the case of the prosecution, or of the defence or to give an unfair advantage to the opposite party. ***In Swapan Kumar Chatterjee vs. Central Bureau of Investigation, 2019 (2) Scale 654***, Hon'ble Supreme Court has held that the power conferred under Section 311 Cr.P.C. should be invoked by the court only to meet the ends of justice and for strong and valid reasons and it should be exercised with great caution and circumspection. Though, Section 311 Cr.P.C. confers vast discretion upon the Court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. The provisions of this section should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 Cr.P.C. has to be exercised judicially for reasons

stated by the Court and not arbitrarily or capriciously. Reference in this context can be made to ***Vijay Kumar vs. State of U. P. : (2011) 8 SCC 136*** as well as to the judgments rendered by this Court in ***Bhag Singh vs. Madan Lal Walia : 1998 (3) Civil Court Cases 597(1)(P&H)*** and ***Joginder Singh vs. Devinder Kumar : 1999(1) Civil Court Cases 202(P&H)***.

7. On applying the above discussed position of law to the peculiar facts of the present case, it has been noticed that respondent No. 2/accused Tushar Khanna had appeared as his own witness while producing defence evidence. He had been examined-in-chief on 25.11.2024. His cross-examination was deferred on that date on the request of learned counsel for the petitioner and this witness was then cross-examined on 15.01.2025. A detailed cross-examination has been conducted. The defence evidence of the accused has been closed on 14.02.2025. The petitioner filed aforesaid application under Section 348 of BNSS on 07.04.2025 making prayer for recalling of DW-1 i.e. accused by submitting that he had paid GST on the invoices in question with GST Department and the respondents had taken Input Tax Credit qua those invoices in their accounts. It is submitted that respondent No.2/accused claimed that the invoices so relied upon by the petitioner were false and, therefore, recalling of DW-1 is must. On a careful perusal of the record, I am, however, of the considered opinion that no reasonable ground for allowing the prayer as made by the petitioner has been made out, in view of the fact that due opportunity to cross-examine DW-1 had been given to the petitioner and he had been so cross-examined in detail. The fact that certain invoices, GST returns and balance sheets etc. were in

existence, was very much within the knowledge of the petitioner at the time of cross-examining the DW-1. The application had been filed by him at the stage when the final arguments had already been advanced by the opposite party. No doubt, Courts have ample power to recall or re-examine or further cross-examine a witness if the same is considered to be necessary for just decision, however, at the same time, it has also to be seen that the said re-examination/cross-examination is not with an intention to fill up the lacuna in the case of that particular party. It is not the position that no opportunity to cross-examine DW-1 had been given to the petitioner in this case. The petitioner has also failed to explain as to how the further cross-examination of DW-1 and putting questions with regard to existence of invoices, GST returns etc. would help the Court in arriving at a proper decision of the case. As such, the learned trial Court has committed no error in declining the prayer made by the petitioner, especially keeping in view the fact that even final arguments have been advanced by the opposite party. Accordingly, finding no merit in the present petition, the same is dismissed.

15.05.2025 **(MANISHA BATRA)**
Waseem Ansari **JUDGE**

Whether speaking/reasoned *Yes/No*

Whether reportable *Yes/No*